No. 83-892

In the Supreme Court of the United States

OCTOBER TERM, 1983

CALIFORNIA STATE DEPARTMENT OF EDUCATION, ET AL., PETITIONERS

v.

LOS ANGELES BRANCH NAACP, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

WALTER W. BARNETT
DENNIS J. DIMSEY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.*, abrogates the states' Eleventh Amendment immunity from suit in the federal courts.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondents, six metropolitan branches of the National Association for the Advancement of Colored People, filed this school desegregation case in the United States District Court for the Central District of California on April 15, 1981, on behalf of their members and a putative class of all black children attending the Los Angeles City schools (Pet. App. A2; Pet. Supp. App. 7). The complaint named as defendants the Los Angeles Unified School District, the Board of Education of the City of Los Angeles, and the Los Angeles Superintendent of Schools (the local defendants); it also named the Governor of California and petitioners, the California State Department of Education,

the California State Board of Education and the California Superintendent of Public Instruction (the state defendants) (Pet. App. A2, A13 n.1).

Respondents alleged in their complaint that the defendants had created and maintained an unconstitutionally segregated school system in the Los Angeles Unified School District. The defendants moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b), for lack of jurisdiction and failure to state a claim upon which relief could be granted. The district court granted the motion with respect to the State Department of Education and the State Board of Education on the ground that the Eleventh Amendment to the United States Consitution barred suits against these state agencies in the federal courts (Pet. App. A2; Pet. Supp. App. 23). The court dismissed the claims against the California Superintendent of Public Instruction and the Governor for failure to allege a case or controversy under Article III of the Constitution (Pet. App. A2). The court thereupon entered a judgment pursuant to Fed. R. Civ. P. 54(b) dismissing the claims against the state defendants.[1]

2. The court of appeals reversed the dismissal of all claims against the state defendants except that against the Governor (Pet. App. A1-A14). The court first held that

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[1]The local defendants moved for dismissal on the ground that the suit against them was barred by adjudication of an identical claim in *Crawford* v. *Board of Education*, No. C822854 (Los Angeles County Superior Ct.). The district court denied the motion and certified an interlocutory appeal (Pet. App. A13 n.1; Pet. Supp. App. 17). In a separate decision, the court of appeals reversed and remanded, holding that respondents are barred from relitigating the claim that the school district was intentionally segregated on or before September 10, 1981, the date the state court accepted the desegregation plan that ended the *Crawford* litigation. *Los Angeles Unified School District* v. *Los Angeles Branch NAACP*, 714 F. 2d 935 (9th Cir. 1983). On March 5, 1984, the court of appeals entered an order granting respondents' petition for rehearing en banc.

respondents "ha[d] alleged a justiciable case or controversy against each of the state defendants" (*id.* at A3) and that, "should unlawful segregation be found here, the district court could formulate a remedy in which the state defendants could participate" (*id.* at A4).

The court of appeals then held that the Eleventh Amendment did not bar the claims against the State Department of Education and the State Board of Education. It ruled that the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.*, abrogates the Eleventh Amendment immunity of those agencies from suit in federal court. The court observed (Pet. App. A7) that the Act expressly prohibits racial segregation by a "State educational agency" (20 U.S.C. 1703, 1720(a)), which is defined as "the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools" (20 U.S.C. 3381(k)).

The court of appeals acknowledged that respondents had not relied upon the Equal Educational Opportunities Act in the district court (Pet. App. A14 n.8). It ruled, however, that "the Act may be pleaded here for the first time on appeal," because respondents' complaint "unquestionably raises sufficient facts to provide for a complaint under the jurisdictional section of the Equal Educational Opportunities Act, 20 U.S.C. § 1706" (Pet. App. A8).[2]

The court of appeals analyzed the Eleventh Amendment defenses of the Superintendent of Public Instruction and the Governor in light of this Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), which held that the Eleventh

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[2]The court of appeals rejected respondents' contention that Congress had set aside the states' immunity from suit in enacting 28 U.S.C. 1331, 1343 and 42 U.S.C. 1983 (Pet. App. A6). The propriety of that ruling is not before the Court.

Amendment generally does not bar actions for injunctive relief against state officers in their official capacities. The court rejected the Superintendent's argument that he is immune from suit because issuance of the injunctive relief sought by respondents would require payment of funds from the state treasury (Pet. App. A9, citing *Edelman* v. *Jordan*, 415 U.S. 651, 668 (1974)). It also rejected his contention that he is immune from suit because he has an insufficient connection with the alleged unconstitutional acts to come with the rule of *Ex parte Young* (Pet. App. A10).[3] The court held, however, that the Eleventh Amendment bars suit against the Governor because "the Governor's general duty to enforce California law under the circumstances of this case does not establish the requisite connection between him and the unconstitutional acts alleged by [respondents]" (Pet. App. A12).[4]

DISCUSSION

1. The petition for a writ of certiorari presents the question whether the court of appeals erred in holding that the Equal Educational Opportunities Act abrogates the states' Eleventh Amendment immunity from suit in the federal courts. In view of the interlocutory posture of this case, however, we submit that the petition should be denied.

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[3]The court stated that its rejection of the Superintendent's arguments based on *Ex parte Young* was "redundant" in light of its ruling that "the Equal Educational Opportunities Act abrogates any immunity he might have thought he possessed" (Pet App. A10-All). The court's discussion of that Act, however, addresses only the Eleventh Amendment immunity of the State Department of Education and the State Board of Education (Pet. App. A5-A8). The petition for certiorari does not seek review of the court of appeals' ruling that the Superintendent is a proper party defendant under the rationale of *Ex parte Young*.

[4]The court's ruling in this regard is difficult to reconcile with its determination that a justiciable controversy exists between respondents and the Governor (Pet. App. A2-A5). Respondents, however, do not contest the dismissal of the Governor as a defendant (Br. in Opp. 4 n.1).

Ordinarily, we would agree that a decision respecting the immunity of a party from suit is appropriately reviewed by this Court at the interlocutory stage. Cf. *Abney* v. *United States*, 431 U.S. 651 (1977). We note, however, that the State will continue to be represented in this litigation regardless of the disposition of the instant petition. The court of appeals held that the State Superintendent of Public Instruction is a proper party defendant under the rationale of *Ex parte Young* (Pet. App. A8-A10), and petitioners do not challenge that ruling in this Court. The Superintendent, in addition to his other duties, is the secretary and executive officer of the State Board of Education and the executive officer of the State Department of Education (see *id.* at A13 n.3). The question whether these agencies should remain nominal defendants in this action is thus of little practical significance.

If petitioners prevail on remand, there will be no need for them to seek review of the question presented in the petition. On the other hand, if they are unsuccessful on remand, they may raise whatever claims they deem appropriate, including the one presented in this petition, in an appeal from the final judgment, and they may thereafter seek further review of their claims in this Court. See *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923).

2. In any event, the court of appeals correctly applied settled legal principles in resolving the question presented. The decision below does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

a. Petitioners concede (Pet. 6-7), as they must, that Congress has the authority under Section 5 of the Fourteenth Amendment to enact legislation lifting the states' immunity from suit in the federal courts. *Fitzpatrick* v. *Bitzer*, 427

U.S. 445 (1976). They assert, however, that the Equal Educational Opportunities Act cannot properly be read to abrogate that immunity. We disagree.[5]

This Court's decisions "require[] an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several States.' " *Pennhurst State School & Hospital* v. *Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 8 (quoting *Quern* v. *Jordan*, 440 U.S. 332, 342 (1979), which held that 42 U.S.C. 1983 does not override the states' Eleventh Amendment immunity). The language of the Equal Educational Opportunities Act evinces an unambiguous congressional intent to subject state agencies and officals to suits in federal court.

Section 1703 of Title 20 provides that "[*n*]*o State* shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin" (emphasis added). That section goes on to prohibit various practices by an "educational agency" that may deny equal educational opportunity, including "the deliberate segregation * * * of students on the basis of race, color, or national origin among or within schools" (20 U.S.C. 1703(a)). The term "educational agency" is defined in 20 U.S.C. 1720 as "a local educational agency or a 'State educational agency' as defined by Section 3381(k) of this title." Section 3381(k) defines the term "State educational agency" as "the State

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[5]Petitioners do not contend that the court of appeals erred in permitting respondents to plead the Act for the first time on appeal. In any event, since the facts alleged are sufficient to support jurisdiction under the Act (Pet. App. A8), the court of appeals' ruling in this regard is unexceptionable. See *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70 n.14 (1978); *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 608 n.6 (1978); cf. *Forman* v. *Davis*, 371 U.S. 178, 182 (1962) ("If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.").

board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools" (20 U.S.C. 3381(k)). Section 1706 of Title 20 authorizes an individual who is denied an equal educational opportunity to "institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate," and Section 1708 confers jurisdiction on the district courts to entertain proceedings instituted under Section 1706.

Congress's intent to subject state educational agencies to suit in federal court under the Act could hardly have been made more explicit. The Act expressly prohibits the denial of equal educational opportunity by state educational agencies and officials,[6] and authorizes an individual who is denied an equal educational opportunity to file suit in federal court "against such parties * * * as may be appropriate" (20 U.S.C. 1706). This constitutes an unequivocal expression of congressional intent to subject state educational agencies and officials to suit under the Act, and it effectively overrides the states' Eleventh Amendment immunity. See, *e.g.*, *Hutto* v. *Finney*, 437 U.S. 678, 693-700 (1978) (state agency liable for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988); *Fitzpatrick* v. *Bitzer, supra* (backpay and attorney's fees may be awarded against the states in suits under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*); *Parden* v. *Terminal Ry.*, 377 U.S. 184, 187-190 (1964)

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[6]Where, as here, primary responsibility for supervision of public elementary and secondary schools is shared among several state educational agencies and officials, each is subject to suit under the Act. *Idaho Migrant Council* v. *Board of Education*, 647 F. 2d 69 (9th Cir. 1981).

(state owning and operating a railroad in interstate commerce is subject to suit under the Federal Employer's Liability Act, 45 U.S.C. 51 *et seq.*).[7]

Since petitioners fall squarely within the Act's definition of "State educational agency" (and do not contend otherwise) they are proper parties defendant in this action.

b. In support of their argument that the Act does not abrogate the states' immunity from suit, petitioners principally rely (Pet. 10-12) upon this Court's decision in *Employees* v. *Missouri Public Health & Welfare Department*, 411 U.S. 279 (1973). That case, however, does not support petitioners' position.

Employees was an action under the Fair Labor Standards Act brought by employees of state health facilities for overtime pay and damages. The Court held that the suit was barred by the Eleventh Amendment, notwithstanding amendments in 1966 that extended the Act's coverage to state employees. The Court observed that the 1966 amendments made no change in the section subjecting employers to suit for violations of the Act (Section 16(b), 29 U.S.C. 216(b)), and it found nothing in the legislative history of the amendments suggesting that Congress intended to deprive the states of their constitutional immunity from suit in federal courts. The Court pointed out that its ruling did not render the extension of the Act to cover state employees

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[7]Petitioners are correct in asserting (Pet. 12-13) that the legislative history of the Equal Educational Opportunities Act does not expressly address the states' Eleventh Amendment immunity from suit in the federal courts. Because the language of the Act clearly subjects state educational agencies and officials to suit in federal court, however, the fact that the legislative history of the Act is silent concerning the Eleventh Amendment is inconsequential. Cf. *Hutto* v. *Finney*, 437 U.S. at 696 (Congress, when exercising its powers under Section 5 of the Fourteenth Amendment, need not "expressly stat[e] that it intends to abrogate the States' Eleventh Amendment immunity").

meaningless because the Secretary of Labor was authorized to bring suit on their behalf under Sections 16(c) and 17 of the Act, 29 U.S.C. 216(c) and 217.

The Court in *Employees* declined to find that Congress had set aside the states' immunity from suit "where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear" (411 U.S. at 286-287). The Court stated that "[i]t would * * * be surprising * * * to infer that Congress deprived Missouri of her constitutional immunity without changing the old § 16(b) under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away" (411 U.S. at 285).

The present case presents an entirely different situation. It does not involve an ambiguous amendment to an existing statute under which the states had not been amenable to suit, but rather a new enactment evincing a clear congressional intent to subject state educational agencies to suit in federal court by "putting [them] on the same footing" as local educational agencies. See 20 U.S.C. 1703, 1706, 1720(a).[8]

Petitioners' reliance (Pet. 9-10) on Section 1702(b) of Title 20 is also misplaced. Congress in Section 1702(b) "specif[ied] appropriate remedies for the elimination of the vestiges of dual school systems,"[9] but also provided expressly

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[8]Other factors serve to distinguish this case from *Employees*. First, the claims in *Employees* were based on a statute enacted pursuant to the Commerce Clause rather than Section 5 of the Fourteenth Amendment. See *Hutto* v. *Finney*, 437 U.S. at 698-699 n.31. Second, the Court in *Employees* was influenced by the facts that the FLSA permitted the employee to "recover double" against the employer and that "private enforcement of the Act was not a paramount objective" (411 U.S. at 286) — factors not present here.

[9]The remedies are listed, in order of priority, in 20 U.S.C. 1713.

that nothing in the Act is "intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States." Section 1702(b) is directed exclusively at the remedial measures available to the federal courts in desegregation cases;[10] it does not address the question of proper parties defendant in such suits. Section 1702(b) is entirely consistent with other provisions of the Act explicitly subjecting state education agencies to suit in the federal courts.

Under petitioners' interpretation of the Act (Pet. 11-12), private persons would be able to sue only local educational entities, while the Attorney General — who is also authorized to file suit under Section 1706 — would be able to proceed against both state and local educational entities. Nothing in the language or legislative history of the Act, however, even remotely suggests that Congress intended such an anomalous result, and no court has ever interpreted the Act in this manner.[11]

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[10]The language in Section 1702(b) regarding the remedial authority of federal courts derives from the Scott-Mansfield substitute for the proposed Griffin amendment to S. 1539, 93d Cong., 2d Sess. (1974). See 120 Cong. Rec. 15076-15079 (1974); S. Conf. Rep. 93-1026, 93d Cong., 2d Sess. 34, 154 (1974); H.R. Conf. Rep. 93-1211, 93d Cong., 2d Sess. 34, 154 (1974). The purpose of the Scott-Mansfield substitute was "to make clear that the bill is not intended to purport to prevent the courts from upholding the Constitution" (120 Cong. Rec. 15078 (1974) (remarks of Sen. Scott)). The substitute was prompted by congressional concerns about the constitutionality of the Griffin amendment's restrictions on the use of student transportation as a means of dismantling dual school systems (*ibid.*).

[11]Relying on *Milliken* v. *Bradley*, 433 U.S. 267 (1977), respondents assert (Br. in Opp. 14-17) that, even if the Equal Educational Opportunities Act does not override the states' immunity from suit, this action is not barred by the Eleventh Amendment because it seeks only prospective injunctive relief. Insofar as it relates to the State Board of Education and the State Department of Education, respondents' position is incorrect. Although the State Board of Education was one of the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

WALTER W. BARNETT
DENNIS J. DIMSEY
Attorneys

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defendants in *Milliken* (see 433 U.S. at 272-273 n.6), the Court's discussion of the Eleventh Amendment issue referred only to the immunity of the defendant state *officials* (433 U.S. 288-291). Subsequent decisions of this Court make clear that the Eleventh Amendment bars unconsented suits against state agencies or departments "regardless of the nature of the relief sought." *Pennhurst State School & Hospital* v. *Halderman*, slip op. 10. See also *Alabama* v. *Pugh*, 438 U.S. 781 (1978).

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